Supreme Court, U.S.
FILED

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No.

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In the

Supreme Court of the United States

GLORIA J. MOSHER,

Petitioner,

versus

DOLLAR TREE STORES, INC., a Virginia Corporation, and NICK LIMO, a/k/a MICHAEL PAUL HERMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an employer may be held strictly liable for harassment by a supervisor on a prohibited basis that includes conduct not only in the workplace but at the residence of the employee where the employee has allowed such intrusions only because they were perpetrated by her supervisor.

Whether constructive discharge is an adverse employment action within the meaning of Ellerth and Faragher.

Whether obvious perjured testimony by the employer's only two witnesses on the material fact of reporting would permit a jury to conclude the employer was dissembling to cover up a discriminatory purpose.

PARTIES TO THE PROCEEDING

Petitioner is Gloria J. Mosher.

Respondent is Dollar Tree Stores, Inc., a Virginia corporation, and Nick Limo, a/k/a Michael Paul Herman.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Seventh Circuit opinion (App. A) is reported at 240 F 3d 662.

The District Court opinion (App.B) is unreported.

STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on February 16, 2001. The Court of Appeals entered an order denying a timely petition for rehearing and petition for rehearing en banc on April 24, 2001 (App. C). On July 25, 2001, the Supreme Court of the United States, Justice Stevens, granted petitioner's Application for an Extension of Time to File a Writ of Certiorari to and including September 15, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

42 USC Section 2000e-2(a)(1)

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
EQUAL EMPLOYMENT OPPORTUNITIES

42 USCS § 2000e-2 (2001)

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

STATEMENT OF THE CASE

Petitioner, Gloria J. Mosher ("Mosher") was the victim of a campaign of actionable sexual harassment conducted by her supervisor, Nick Limo ("Limo") which commenced the day she was hired by Limo and over a two-week period progressed to pulling Mosher onto his lap and cupping her breasts, Limo stating to Mosher in front of other employees, "It would be the best sex you ever had," Limo putting his hands on Mosher's hips and gyrating his pelvis into her behind, all accompanied by Limo constantly asking Mosher, "Do you like your job?" which Mosher reasonably and subjectively perceived as attempts by Limo to influence or control her conduct and receptiveness toward his sexual advances. Other assistant managers and another employee all noticed that Mosher seemed fearful of Limo in the workplace and constantly was seeking ways to avoid any contact with him.

Approximately two weeks after Mosher commenced her employment and while being subjected to Limo's increasingly severe, pervasive and sexually abusive conduct, which now included unwelcome sexual intercourse in the employee bathroom, Mosher reported his conduct to the assistant manager, Richard Martin ("Martin"). William Rice,

("Rice") was the district manager of defendant, Dollar Tree Stores, Inc. ("Dollar Tree") and the person Dollar Tree identified as the first person to be reported to in the event of any sexual harassment allegations. Martin reported to Rice not only that Mosher had complained of Limo's sexually-harassing conduct, but that Limo himself had told Martin he was "going to Mosher's apartment, but she didn't want him there". Rice told Martin he would speak with Limo about the "situation". Shortly thereafter, Martin overheard a conversation between Rice and Limo wherein Rice told Limo, "Well, you know she can't be working here". Martin's version of these events is corroborated by a completely independent witness by affidavit.

Rather than take appropriate action, Rice did nothing. Thus perceiving that he had free reign, Limo took his harassment campaign out of the store and into Mosher's apartment. Limo commenced appearing at Mosher's apartment and demanding sex or a place to rest for a few hours because Limo was running a limousine service on the side and actually resided 50 miles from his primary place of work at Dollar Tree. At no time was Limo's intrusion and presence in Mosher's life in any way welcomed by Mosher. She at first feared for her job, and later came to fear that she would be physically harmed by Limo because she had learned that he used different Social Security numbers, aliases, and different residences. Limo implied that he would physically harm Mosher if she caused him trouble. Finally, after four months on the job, Mosher felt compelled to resign her position at Dollar Tree in an attempt to rid herself of Limo's presence. At no time did Limo "live with" Mosher. He had no key to the apartment, did not know the address at his deposition, received no mail there and, in fact, one month prior to Mosher's resignation had submitted a new residential phone number to Dollar Tree as was required by all store managers. The phone number was not Mosher's.

After Mosher left the employment of Dollar Tree, Limo continued to sporadically appear at her apartment demanding access. Mosher granted access out of reasonable fear for her physical safety. Finally, in November of 1997, Limo stopped appearing at Mosher's apartment, and she felt safe enough to file a complaint with the EEOC. That complaint led to Mosher's suit against Dollar Tree and Limo filed in Federal District Court, Northern District of Illinois.

Despite the foregoing facts, the District Court granted Dollar Tree's motion for summary judgment, holding that in essence, Mosher and Limo were living together and, therefore, none of Limo's conduct could be considered actionable. Mosher filed a timely appeal and the Seventh Circuit affirmed the District Court. The Seventh Circuit engaged in the same fact finding as the District Court and simply held that "even viewing all the facts in the light most reasonable to Mosher, no reasonable jury could conclude that she was anything other than a willing participant in a long, consensual relationship with her boss." On April 24, 2001, the Seventh Circuit denied Mosher's petition for reconsideration and rehearing en banc. Mosher filed an application for extension of time to file a petition for writ on July 23, 2001, and Justice Stevens extended the time to September 15, 2001.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND WITH PRIOR DECISIONS OF THE SEVENTH CIRCUIT.

The Court of Appeals holding that no reasonable jury could conclude that she [Mosher] was anything other an a willing participant in a long, consensual relationship with her boss is in direct conflict with the United States Supreme Court decisions in Meritor Savings Bank v. Vinson , 477 U.S. 57, 91 L.Ed 2d 49 (1986); Harris v. Forklift Sys., Inc., 510 US 17, 21 (1993); Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133, (2000); and the Seventh Circuit's holding in Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1456 (7th Cir. 1994).

The Seventh Circuit resolved what must be a jury question as to whether or not the sexual abuse and outright criminal conduct directed at Mosher by Limo was "welcome within the meaning of that term in Meritor. In Meritor, this Court made it abundantly clear that the fact that sex-related conduct was voluntary in the sense that the complainant was not forced to participate against her will is not a defense to a sexual harassment suit under Title VII and further, that the question whether particular conduct was indeed unwelcome turned largely on credibility determinations committed to the trier of fact. This Court further noted that the correct inquiry is whether a victim, by her conduct, indicated that the alleged sexual advances were unwelcome.

In Meritor, the plaintiff initially resisted her supervisor's sexual demands but then succumbed and over a

four-year period engaged in sexual intercourse with her supervisor numerous times. On the other hand, Mosher was hired by her supervisor, Limo, in mid-January of 1997, immediately subjected to his sexual demands, resisted those demands, and reported his conduct. When Limo's demands became increasingly abusive and no action was taken by the district manager, Rice, Mosher was compelled to resign in May of 1997. Furthermore, Mosher produced evidence that Limo knew she desperately needed her job in order to pay for life-saving medication due to two prior heart surgeries. Mosher was a particularly vulnerable victim, and this was recognized by Limo. Mosher had not worked in eleven years prior to her job with Dollar Tree and was not sophisticated in the ways of the workplace.

In Harris, *supra*, the Supreme Court directs courts to determine whether an environment is sufficiently hostile or abusive by looking at all the circumstances, including the frequency, severity, and whether it is physically threatening or humiliating to the extent that it unreasonably interferes with an employee's work performance.

The record clearly establishes that MOSHER'S reactions are inconsistent with a woman who was "consenting" to LIMO's abuse. Dey , *supra*.

Mosher had little education or work experience and reasonably feared that she would not be able to obtain another job if Limo fired her or chose to change her hours requiring her to work beyond what she was permitted to work in order to obtain full disability under Social Security. In effect, Limo picked his victim, stalked her, and used her, all with the knowledge of his district manager, Rice.

Indeed, Rice and Limo perjured themselves on the material fact of reporting when the following exchanges took

place:

A **Rice Testimony**

1. While attempting to obtain a sworn statement from a former employee, Diana Brooker, DOLLAR TREE'S head of human resources, in the presence of DOLLAR TREE'S attorney, offered employment to Brooker. (Brooker Affidavit, A25).

2. Rice testified that LIMO provided a written statement to the EEOC at DOLLAR TREE'S request, stating "You [Rice] knew we were living together. It came up before." (ROA 35, Ex. 3, P. 77).

3. LIMO testified that he did not have a conversation with Rice regarding his sexual contact with MOSHER. (ROA 35, Ex. 9, P. 42) and when asked again, "Ever?" LIMO answered, "No." (ROA 35, Ex. 9, P.43).

4. Rice testified that he asked LIMO about his sexual contact with MOSHER in March. (ROA 35, Ex.3, P.81).

5. Next, Rice testified that he had a conversation with LIMO in "May or June or April" and instructed LIMO, "That was against company policy to be doing something like that . . . and that it disappointed him and that it is "strictly against company policy" and "one of them would have to transfer out of that store if it's a fraternizing situation". (ROA 35, Ex. 3, P.79).

6. When asked what if it [LIMO's sexual conduct] wasn't a fraternizing situation, Rice answered, "I would have to take some counseling from Human Resources to see what our options were. I don't know what the policies

and procedures manual says in that regard." (ROA 35, Ex. 3, P.80).[1] DOLLAR TREE never asked or suggested that MOSHER or LIMO to transfer to another store.

7. Rice testified that he had a conversation in March of 1997 with Martin. (ROA 35, Ex. 3, P.83).

8. Rice testified he couldn't recall if Martin told him LIMO was not going to MOSHER'S apartment by "mutual agreement". (ROA 35, Ex. 3, P.117).

9. Rice testified that he spoke with MOSHER about "the situation" in mid-March, 1997. (ROA 35, Ex. 3, P. 118, 119).

10. Then Rice testified that he never spoke with MOSHER about the allegations. (ROA 35, Ex. 3, P. 117).

11. After testifying that he never spoke to Mosher about the allegations, Rice testified that he didn't talk to Mosher because "they were in agreement". When asked how he knew that, Rice testified that he heard that from Mosher and that "somewhere along the line, she must have said 6 something". (ROA 35, Ex. 3, P. 119).

12. Then Rice was asked:

Q You just testified three different ways that you never talked to MOSHER about "that relationship". Which is it?

A Well, then, I would have to say I did speak

---

[1] Rice is the person identified by Dollar Tree as the first person to notify in the event of a sexual harassment complaint. (Dollar Tree Answers to Interrogatory, ROA 35, Ex.7). (ROA 35, Ex. 3, P.120).

with her.

LIMO Testimony

1. The District Court was advised at a hearing on discovery cutoff on March 9, 1999, that background investigation had determined that LIMO had in the past used two or three different Social Security numbers, had multiple addresses and "residences," several names and aliases, a bank account for a business which LIMO denied operating, and furthermore, that LIMO had invoked the Fifth Amendment three separate times during his deposition. (A32, ¶7).

2. LIMO testified that he wrote to the EEOC at DOLLAR TREE'S request telling them Rice knew he and MOSHER were living together. (ROA 35 Ex. 3, P.124).

3. LIMO testified at his deposition that Rice never knew about his "sexual contacts" with MOSHER. (ROA 35, Ex. 9, P. 42,43).

4. LIMO had his last name legally changed from Herman to Limo. (A32, ¶7).

5. LIMO denied ever operating a limousine/escort business. (A26)

6. LIMO produced canceled checks for MOSHER's rent commencing in April, 1997, drawn on the account of "Nick's Limo LUV".

These contradictions in sworn testimony undermine the credibility of Rice and Limo and cast doubt on their more fundamental testimony that Mosher was somehow consenting to Mosher's sexually abusive conduct. Pryor v. Seyfarth, Shaw, F 3d (7th Circ. 2000).

Reeves expands on the principal enunciated by the Seventh Circuit in Pryor. Reeves was decided on June 12, 2000, the day Mosher filed her brief in the Seventh Circuit. Mosher argued in her motion for reconsideration and petition for rehearing en banc that Reeves applied to an analysis of the record in this case. Clearly, a jury could conclude from the obviously perjured testimony of Limo and Rice that they were dissembling to cover up a discriminatory purpose, and a jury could conclude that this is affirmative evidence of guilt.

In any analysis of this record, when welcomeness under Meritor is substituted for "consent," it is clear that Mosher presents questions of material fact which are credibly disputed and which a jury must decide.

II.

THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER OR NOT CONSTRUCTIVE DISCHARGE CONSTITUTES AN ADVERSE EMPLOYMENT ACTION UNDER ELLERTH AND FARAGHER.

In Burlington Indus., Inc. v. Ellerth , 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 US 775 (1998), the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. Furthermore, an employer is strictly liable for harassment by a supervisor on a prohibited basis that culminates in a tangible employment action. No affirmative defense is available in such cases. The Supreme Court has yet to decide the question of whether or not constructive discharge is an adverse employment action thus triggering strict liability on the employer. However, the Second and Third Circuits have ruled on this issue with contradictory results.,

The Court of Appeals noted that it had yet to determine whether a constructive discharge is a tangible employment action within the meaning of Ellerth and Faragher, but noted that the Second Circuit in Caridad v. Metro-North Commuter R.R., 191 F.3d 283, has held that, "Constructive discharge does not constitute a tangible employment action, as that term is used in Ellerth and Faragher." The Seventh Circuit declined to settle that issue in this case because they found Mosher had not raised a genuine issue of material fact that she was constructively discharged.

The Court's reasoning in Caridad was that the plaintiff hadn't complained of the harassment prior to resigning her position. Therefore, because the employer had no opportunity to correct the situation, it would not be fair to impose strict liability on the employer for the sexual harassment committed by the supervisor. By implication, it would seem that the Caridad court might have reached a different conclusion had the plaintiff complained and reported of the harassment prior to resignation.

By contrast, the Third Circuit held in Durham Life Insurance Company v. Evans, 166 F 3d 139 (3d Cir. 1999) that constructive discharge is an adverse employment action under Ellerth and Faragher and imposed strict liability on the employer for the prohibited conduct committed by the plaintiff's supervisor. The Durham court noted that the employer's argument on this theory would result in a situation where any substantial adverse action, such as a demotion in authority or pay, would not be a tangible adverse employment action if it led the affected employee to quit before the demotion took effect. The Court stated that was contrary to Title VII doctrine, which recognizes a constructive discharge under such circumstances. Judge Garth, in his concurring opinion at Footnote 5, notes that the

Supreme Court decisions [Burlington and Faragher] are "unequivocal and are directly applicable to this appeal without extending the analysis beyond the facts of this case. Ms. Evans provided proof of a tangible adverse employment action (i.e., she was made to leave her job), and this action was on the basis of her supervisor's behavior. Here, Ms. Evans was the subject of a tangible adverse employment action, the District Court found that her supervisors were responsible for her constructive discharge, and the District Court returned a verdict compensating her for the damages she suffered".

Had the Court of Appeals properly recognized that Mosher presented genuine issues of material fact on the question of the welcomeness of her supervisor's conduct (Meritor); the severity and pervasiveness of such conduct, and Mosher's reasonable objective and subjective perceptions of that conduct (Harris); and viewed the record from a Reeves analysis, they should have concluded that Mosher was forced to resign because of the prohibited conduct of her supervisor and that her resignation was a constructive discharge amounting to an adverse employment action, thus resulting in strict liability of Dollar Tree for the prohibited sexual harassing conduct of its supervisor, Limo.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 00-1508

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GLORIA J. MOSHER,
Plaintiff-Appellant,

v.

DOLLAR TREE STORES, INC., a Virginia corporation, and NICK LIMO, a/k/a Michael Paul Herman,
Defendants-Appellees.

November 2, 2000, Argued

February 16, 2001, Decided

COUNSEL:
For GLORIA J. MOSHER, Plaintiff - Appellant: Robert Balfour, Geneva, IL USA.

For DOLLAR TREE STORES, INCORPORATED, Defendant - Appellee: Michael D. Karpeles, GOLDBERG, KOHN, BELL, BLACK, ROSENBLOOM & MORITZ, Chicago, IL USA. Beth Hirsch Berman, HOFHEIMER, HUSBAUM, Norfolk, VA.

JUDGES:
Before MANION, KANNE, and EVANS, Circuit Judges.

OPINIONBY:
EVANS

OPINION:

EVANS, *Circuit Judge*. This is a he-said/she-said case, where one party claims they shared a mutually beneficial, consensual relationship and the other alleges sexual harassment. Gloria Mosher, a part-time cashier at a Dollar Bills store (it's owned by the defendant, Dollar Tree Stores, Inc.) in Aurora, Illinois, claims she was sexually harassed by the store manager, Nick Limo, with whom she shared an apartment and a bed. Mosher allowed Limo to pay half her rent, accepted his gifts, met his parents, referred to him as her boyfriend, and continued their relationship for several months *after* she quit her job at the store. Nonetheless, she says that the 9-month relationship, during and after her employment, occurred against her will. Even giving credence to what she said, and viewing the facts in the light most favorable to her, we find that she fails to allege a claim for sexual harassment, and so we affirm the grant of summary judgment in favor of her employer. We also find Mosher's claims that the district judge was biased against her and abused his discretion when he denied her third request to extend discovery to be unavailing.[1]

The tale begins in January 1997, when Mosher, who had not had a job for 11 years, took one as a part-time cashier at the Aurora store after being hired by Limo, the store's manager. In her deposition, Mosher acknowledges that Limo helped her fill out the application form and handed her an employee handbook. However, later she contends that her memory grew hazy, and she could not recall whether or not she had actually received the handbook. Dollar Tree maintains that it had a policy and practice of distributing its employee handbook to all employees and that each store displayed an employment poster in the employee bathroom listing a contact number where employees could report harassment. Mosher denies ever seeing this poster.

After her first day of work, Limo asked Mosher out to dinner, and she accepted his invitation. She claims she went only because she thought that if she didn't, there might be problems on the job. However, she admits that at the time, Limo did not say anything that could be construed as threatening. At dinner, the two discussed job duties and how many hours Mosher would work. Mosher contends that Limo also told her that if she "played [her] cards right," she would "go places," but that he did not explain what he meant by this comment.

Mosher returned to work the next day. On her third day at work, during a break, Mosher left the cash register and went to the back of the store. There, Limo pulled her onto his lap and fondled her breasts. She protested, got up, and returned to the cash register. In addition, Mosher contends that Limo continued to ask her out to dinner after each of her shifts and frequently asked her "out of the blue" how she liked her job.[2] She believed these questions were asked in a threatening manner.

Approximately 2 weeks after she started work, Limo asked for directions to Mosher's home, which Mosher provided, although she now contends that she did so under duress. Nevertheless, that evening Limo drove to Mosher's apartment. They had sex and he stayed the night. He returned the following evening and many nights afterwards, bringing with him a change of clothes. At the time, Limo was living at home with his parents, and he contends that Mosher and he agreed that he would start paying half her rent and would live with her.

Mosher admitted that Limo paid half her rent from March 1997 until their relationship ended in October of the same year. She also conceded that she accepted a check from Limo for clothes and that he bought a microwave and air conditioner for her apartment, which he left with her after their relationship ended. Although Limo paid half the rent,

Mosher never gave him a key to the apartment, but she let him in every time he called. The two also attended social functions together. Mosher acknowledged that she attended a birthday celebration at a local restaurant with Limo's parents and afterwards went to his parents' home for cake.

While at the Dollar Bills store, neither Mosher's work responsibilities, schedule, nor salary changed. Although Mosher alleges that she was forced to resign due to the harassment, she concedes that she never reported the situation to Limo's superior, the district manager Bill Rice. Early in her tenure, in February 1997, Mosher did speak with a new assistant manager, Richard Martin. She told Martin that she was upset and did not like her working conditions. Although she did not provide details, she did state that Limo was "after her."[3] Four months later, in the end of May, Mosher left her job at the Dollar Bills store. However, her sexual relationship with Limo continued for another 5 months, and he continued to pay rent.

After she resigned, Mosher accepted a higher-paying position at a clothing store a few blocks from the Dollar Bills store. Although she continued to work in the same shopping plaza, Mosher testified that Limo did not visit her in her new place of employment, nor did he attempt to contact her after their relationship ended in October.

From March 1997 onwards, while she was employed at the Dollar Bills store, Mosher was seeing two physicians, one for medication, Dr. Kris Gururajan, and the other for counseling, Dr. Stephen De Jaynes.[4] Both doctors testified that during her visits Mosher reported that she had found employment, stated that she was quite happy with her new job, and that she had a new boyfriend.[5] She did not tell either physician that she was afraid of losing her job or that she was subject to a harassing work environment.

We review the district court's grant of summary judgment in favor of Dollar Tree *de novo*. *Doe v. Howe Military Sch.*,

227 F.3d 981, 990 (7th Cir. 2000). Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, admissions, and affidavits leave no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

In recent cases the Supreme Court abandoned the commonly used categories of *quid pro quo* and hostile work environment harassment, opting instead to distinguish between cases based on whether the supervisor took a tangible employment action against the complaining subordinate and those cases in which no such action was taken. *Burlington Indus. v. Ellerth, 524 U.S. 742, 760-65, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998).* In establishing the standards that govern vicarious liability of an employer for the harassing actions of an employee, we look to the agency principles developed by the Court. *Ellerth,* at 754-55; *see also Molnar v. Booth, 229 F.3d 593, 600 (7th Cir. 2000).*

Here, Mosher contends both that she suffered a tangible employment action and that she was subjected to a sexually harassing work environment. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth, 524 U.S. at 761.* Mosher was not fired. She quit and now claims to have been constructively discharged.

First, it should be noted that we have yet to determine whether a constructive discharge is a tangible employment action within the meaning of *Ellerth* and *Faragher. Cf. Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 294 (2nd Cir. 1999)* ("Constructive discharge does not constitute a 'tangible employment action,' as that term is used in *Ellerth* and *Faragher.*").[6] However, we need not settle that issue

today, for we find that Mosher did not raise a genuine issue of material fact that she was constructively discharged.

An employee can assert a claim of constructive discharge when she is forced to resign because her working conditions, from the standpoint of the reasonable employee, have become unbearable. *Lindale v. Tokheim Corp., 145 F.3d 953, 955 (7th Cir. 1998).* Although an employee facing a discriminatory or harassing work environment is not required to file suit before resigning, failure to object to egregious conditions or to seek some form of redress is compelling evidence that the employee, or any reasonable worker, would not find the conditions intolerable. *Id.* Absent extraordinary conditions, "a complaining employee is expected to remain on the job while seeking redress." *Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1015 (7th Cir. 1997).*

Mosher admits that she never confided in anyone at the store. She never reported the situation to Rice, Limo's supervisor. At most, we can find that she spoke rather obliquely to a newly appointed assistant manager, Martin, early in her tenure in February 1997. However, she did not resign until 4 months later in May. Thus, Mosher is unable to claim that incidents occurring in February-- such as being asked to dinner, questioned, or fondled-- were the triggering events that made it impossible for her to remain at the store. Rather, she bases her constructive discharge claim on a patchwork of contributing factors, including her living arrangement with Limo.

Mosher and Limo entered into a living arrangement and an ongoing sexual relationship shortly after she began working at the store. Mosher contends that this situation was entirely involuntary and that she agreed to it only because she needed to keep her job. However, the facts surrounding Mosher's relationship with Limo do not suggest an objectively hostile or abusive situation.

Mosher allowed Limo to pay half her rent for 9 months and regularly had sex with him. She never gave him a key, but rather allowed him into her apartment during each visit. She accepted his gifts, met his parents, and referred to him as her boyfriend. Although Mosher contends that subjectively she was afraid of Limo and had sex with him only in order to keep her job, her allegations are inconsistent with her actions. Not only did she not report the situation to management, but she never alerted her own counselor or physician. Rather, her report to both treating physicians was positive, indicating that she was engaged in a consensual relationship. Moreover, she did not attempt to rid herself of Limo. After she quit her job she took a new one only blocks away and continued to see Limo and have sex with him for another 5 months until their relationship ended in October. Finally, although Mosher contends that Limo was pertinacious, once their relationship ended, Mosher admitted that he never came to visit her in her new place of work or made any other attempt to contact her by phone or in person.

Overall, Mosher's passivity, her unwillingness to alert anyone or to change her living arrangement with Limo, are inconsistent with her claim that she was subject to an unbearable work environment and that her only option was to flee Limo by quitting her job. Thus, we find that Mosher was not constructively discharged.

Next, Mosher contends that she was subject to a hostile work environment. Because this claim does not involve a tangible employment action, Dollar Tree contends that in keeping with *Ellerth* and *Faragher* it is entitled to assert the affirmative defense that it exercised reasonable care to prevent and correct any sexually harassing behavior and that Mosher unreasonably failed to take advantage of preventive or corrective opportunities. *Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.* However, Dollar Tree's request is untimely. It failed to assert this defense below and cannot do so now. "We have long refused to consider arguments that

were not presented to the district court in response to summary judgment motions." *Cooper v. Lane, 969 F.2d 368, 371 (7th Cir. 1992).* Thus, we consider only whether Mosher alleges facts consistent with a claim of hostile work environment and find that she does not as a matter of law.

In order to be actionable under Title VII, "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher, 524 U.S. 775, 787, 141 L. Ed. 2d 662, 118 S. Ct. 2275.* In determining whether an environment is sufficiently hostile or abusive we look at the totality of the circumstances, including but not limited to the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id. at 787-88* (quoting *Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993)).*

The most significant and disturbing incident recalled by Mosher occurred on her third day of work when she says Limo pulled her onto his lap and fondled her breasts. While this readily could be considered a severe incident, Mosher's reaction suggests that she did not perceive it as such. At the time, she reported the incident to no one and within weeks was involved in what can only be reasonably described as a consensual sexual relationship with Limo which continued for many months. *See Dey v. Colt Const. & Dev. Co., 28 F.3d 1446, 1454 (7th Cir. 1994)* ("If the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is not a Title VII violation.") (quoting *Harris, 114 S. Ct. at 370).*

Even viewing all the facts in the light most favorable to Mosher, no reasonable jury could conclude that she was

anything other than a willing participant in a long, consensual relationship with her boss. Getting involved in a relationship like that is, for both an employee and a boss, usually unwise. But it happens. As long as men and women work together, the potential for sexual sparks to fly in the workplace will always exist. But after a long-time sexual relationship like this one goes sour, it will be only the unusual case that can escape summary judgment. And this one is not that unusual.

AFFIRMED.

FOOTNOTES

[1] Mosher did not file a motion to have the district judge recused but rather appears on appeal to be alleging judicial bias based on a letter sent by Judge George M. Marovich to both litigants. The letter invited both parties to provide the court with a candid assessment of their case including: whether the case could be decided by dispositive motions, the likelihood of success on the merits, the scope of damages, and what legal expenses would be incurred. In this case, both parties submitted responses, and Mosher contends that after receiving these ex parte communications the judge's attitude towards Mosher's case changed. First, we note that in litigious districts such as the one in Chicago, federal judges carry an unwieldy burden. Innocuous case management tactics such as Judge Marovich's letter are designed to help judges organize their trial schedules, promote settlement, and better serve the needs of the litigants that come before them. We find nothing improper in Judge Marovich's letter or his receipt of responses and find he acted well within his discretion. Finally, the court gave Mosher almost a full year to conduct discovery. Thus, we find the judge did not abuse his discretion when he refused to extend discovery for a third time, where Mosher claimed to have failed to obtain all of her own medical records.

[2] On appeal, Mosher submits new allegations of harassment which were not raised below. We limit our review to facts that were before the district court when it granted summary judgment. *See Arendt v. Vetta Sports, Inc., 99 F.3d 231, 237 (7th Cir. 1996)* (issues not raised in the district court are deemed waived).

[3] Dollar Tree's Attorney: You said in your complaint that you complained about Mr. Limo to an assistant manager named Richard?

> Mosher: Yeah. I told him that I was upset, and I didn't like working under the conditions and, you know.
>
> . . . .
>
> Attorney: What did you tell Richard?
>
> Mosher: I just said that I was unhappy, you know. I just came there to work. I'm on Social Security. I'm a cardiac patient. I hadn't worked in 11 years. I moved to this place. I was paying X-amount more dollars than I did before, so I had to work. That's what it was.
>
> . . . .
>
> Attorney: So you never confided in Richard. You never said that he's sexually harassing me, that he's forcing me to have sex, nothing like that?
>
> Mosher: I never confided in anybody in that store.
>
> Attorney: About anything?
>
> Mosher: No. It was rather embarrassing.

[4] Mosher provided her medical records to opposing counsel to substantiate her claim for emotional damages.

[5] Dollar Tree's Attorney: Do you remember what she said about it?

> Dr. Gururajan: She said she got a job and she is quite happy about the work. In fact, if I remember right, I think she told me she hasn't had a job for a long time and she was happy that she got a job.
>
> . . . .
>
> Attorney: Did she ever tell you she was in a relationship of any kind?
>
> Dr. Gururajan: She did tell me that she has a boyfriend . . . I asked her whether she talked about this to her counselor and she said she is planning to talk to him.
>
> . . . .
>
> Dollar Tree Attorney: What did she say [about Limo]?
>
> Dr. Stephen De Jaynes: In general, that the relationship was positive and at one point, I believe, she had planned to move in with him. They were going to get an apartment together, I believe.

[6] The Second Circuit concluded that constructive discharge is not a tangible employment action, in part because even co-workers may be responsible for a constructive discharge and a constructive discharge is neither ratified nor approved by management. *Caridad, 191 F.3d at 294.*

98 C 2295

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

GLORIA J. MOSHER,
Plaintiff,

v.

DOLLAR TREE STORES, INC., a Virginia Corporation, and NICK LIMO, a/k/a MICHAEL PAUL HERMAN,
Defendants.

January 27, 2000, Decided

January 28, 2000, Docketed

COUNSEL:

For GLORIA J MOSHER, plaintiff: James Robert Wyer, Law Office of James R. Wyer, Geneva, IL.

For GLORIA J MOSHER, plaintiff: Robert L Balfour, Jr, Law Offices of Robert L. Balfour, Geneva, IL.

For DOLLAR TREE STORES, INC., defendant: Michael Dean Karpeles, Deborah Rzasnicki Hogan, Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Ltd., Chicago, IL.

For DOLLAR TREE STORES, INC., defendant: Beth Hirsch Berman, Linda Laibstain, Hofheimer, Nusbaum, McPhaul & Samuels, P.C., Norfolk, VA.

JUDGES:
GEORGE M. MAROVICH, UNITED STATES DISTRICT JUDGE.

OPINIONBY:
GEORGE M. MAROVICH

OPINION:

MEMORANDUM OPINION AND ORDER

Plaintiff Gloria J. Mosher ("Mosher") has filed this action against Defendants Dollar Tree Stores, Inc., ("Dollar Tree") and Nick Limo, a/k/a Michael Paul Herman ("Limo"), alleging sexual harassment pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), *42 U.S.C. § 2000e* et seq. (Counts I and II) and intentional infliction of emotional distress (Count III). Dollar Tree now moves for summary judgment. For the reasons set forth below, Dollar Tree's motion is granted.

BACKGROUND

Unless otherwise noted, the following facts are undisputed. On January 18, 1997, Mosher began working for Dollar Tree at one of its stores--"Dollar Bills"--in Aurora, Illinois as a part-time cashier. Mosher had been unemployed for eleven years prior to being hired by Dollar Tree. During her employment with Dollar Tree, Mosher's immediate supervisor was Limo, the store manager at Dollar Bills.

On her first day of work at Dollar Bills, Limo asked Mosher to go to dinner with him. Mosher agreed, and did, in fact, have dinner with Limo that evening. Mosher says that she went to dinner because she felt that "there might be problems on the job" if she didn't go. (Mosher Dep. at 31.) She admits, however, that Limo never said that there would be problems if Mosher declined his invitation. (Id.)

That night at dinner, Limo and Mosher discussed, inter alia, her job duties and how many hours a week that Mosher would work. Mosher contends that Limo also told her that if she "played [her] cards right," she could "go places," but that Limo did not say what he meant by that statement. (Id. at 32.)[1]

On several occasions shortly after she started working for Dollar Tree, Limo asked Mosher, "just out of the blue," if she liked her job. (Id. at 37.) Mosher claims that she viewed such a question as a threat with respect to her job. (Id. at 32-33.) Limo, however, insists that he never threatened Mosher or required her to have any type of relationship with him in order to keep her employment. (Limo Dep. at 109; Limo Aff. P 7.)

Approximately two weeks after she started working for Dollar Tree, Limo asked Mosher for directions to her house.[2] Mosher gave him the directions to her house and let him in when he arrived. That night, Mosher and Limo engaged in sexual intercourse, and Limo stayed the night at Mosher's apartment. Limo returned to spend the night at Mosher's apartment the following evening, and many nights thereafter, often bringing bundles of his clothes with him.

The parties disagree about whether Limo was actually "living" at Mosher's apartment. According to Limo, Mosher and himself began dating shortly after Mosher starting working for Dollar Tree, and, at some point, they decided that Limo should move in with Mosher. Mosher, on the other hand, maintains that Limo did not live at her apartment, but that she let him in each time he came to her home because she was afraid of him. In any event, it is undisputed that Limo continued to spend most every night at Mosher's apartment from sometime in February 1997 until October 12, 1997 and that Limo kept many of his personal belongings there. (Def. 12(M) P 16, Pl. 12(N) P 16.) It is also undisputed that although Limo never had a key to Mosher's apartment,

starting in March 1997, he began paying half of Mosher's monthly rent.

Limo says that he believed that his relationship with Mosher was mutually consensual and that Mosher never indicated to him that she did not welcome the attention he gave to her. (Defs. 12(M) PP 13, 14.) Limo points out, for example, that one time Mosher went with him to a wedding of one of his friends and that, another time, she went to dinner with his parents. Mosher, however, denies that their relationship was mutually consensual, and, although she acknowledges that she attended certain social functions with Limo, Mosher contends that she did not go "voluntarily." (Pl. 12(N) PP 77, 79.) Mosher also disputes Limo's assertion that she never indicated to him that she did not welcome his attention. In particular, Mosher claims that one night while she was in the back of the store at Dollar Bills, Limo pulled her on his lap and put his hands on her breasts. Mosher states that she told Limo "Don't," and then went back to her cash register. (Mosher Dep. at 35.) Limo denies that such an incident occurred. (Limo Aff. at P 2.)

In 1997, Dollar Tree had policies prohibiting sexual harassment and procedures for reporting sexual harassment set forth in its employee handbook. Dollar Tree maintains that it was its policy and practice to distribute its employee handbooks to all Dollar Tree employees. Mosher does not remember whether she actually received a Dollar Tree handbook.

Mosher testified at her deposition that, in February 1997, she told Richard Martin ("Martin"), then assistant manager at Dollar Bills, that she was upset with her situation at work and that Limo "was after her," but that she did not tell Martin that Limo was having sex with her or staying at her apartment. (Id. at 56-57.) Yet, Martin testified that Mosher told him that she was being sexually harassed by Limo and that he relayed this information to William Rice ("Rice"), District Supervisor

for Dollar Tree, in March 1997. However, Rice insists that although Limo advised him (Rice) sometime in March or April of 1997 that Limo and Mosher had a "relationship" and that they were "living together," (Rice Dep. at 77-78, 106), neither Martin nor Mosher ever told him that Mosher believed that she was being sexually harassed by Limo.

On May 29, 1997, Mosher quit working at Dollar Bills because she felt she could not tolerate the situation anymore. (Mosher Dep. at 42.) One of Mosher's friends, Frances Cody ("Cody"), testified that Mosher was upset about her situation with Limo, that she was very stressed and depressed about it, and that Mosher quit her job at Dollar Tree because she was "disgusted" with Limo and couldn't take it anymore. (Cody Dep. at 36-37.) Shortly after leaving Dollar Bills, Mosher obtained employment at a store called "Dots," located just a few doors down from Dollar Bills.

After leaving the employment of Dollar Tree, Limo continued to stay overnight at Mosher's apartment on a regular basis for approximately five more months. Limo removed his belongings from Mosher's apartment on October 12, 1997; Limo and Mosher have not spoken since that day.

On November 3, 1997, Mosher filed a charge of discrimination against Defendants with the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued Mosher a Notice of Right to Sue on January 15, 1998, and on April 14, 1998, Mosher filed the present action in this Court. Dollar Tree now moves for summary judgment.

DISCUSSION

I. Standards for Summary Judgment

Summary judgment is appropriate where the pleadings, answers to interrogatories, affidavits, and other materials show that there exists "no genuine issue as to any material fact" and that the moving party is entitled to judgment as a

matter of law. Fed. R. Civ. P. 56(c). Only genuine disputes over "material facts" can prevent a grant of summary judgment. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* "Material facts" are those that might affect the outcome of the suit under governing law. Id. A "genuine issue" exists only if there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Id. at 249.* When considering a motion for summary judgment, a court must view the facts, and all reasonable inferences drawn therefrom, in a light most favorable to the non-movant. *Griffin v. Thomas, 929 F.2d 1210, 1212 (7th Cir. 1991).*

II. Sexual Harassment Claims

In Counts I and II of her Complaint, Mosher alleges that she was subjected to quid pro quo and hostile work environment sexual harassment. Although the United States Supreme Court has stated that the terms "quid pro quo" and "hostile work environment" are not controlling for purposes of establishing employer liability, the terms remain useful with regard to the initial inquiry into whether a plaintiff can prove actionable discrimination. See *Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751, 118 S. Ct. 2257, 2264, 141 L. Ed. 2d 633 (1998).* The terms "quid pro quo" and "hostile work environment" "illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general." *118 S. Ct. at 2265.* Mosher has failed to produce evidence sufficient to survive summary judgment under either category of sexual harassment.

A. Hostile Work Environment Claim

Title VII "does not prohibit all verbal or physical harassment in the workplace." *Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 118 S. Ct. 998, 1002, 140 L. Ed. 2d 201 (1998).* Instead, only "sexual harassment so 'severe or pervasive' as to 'alter the conditions of [the victim's]

employment and create an abusive working environment' violates Title VII." *Faragher v. City of Boca Raton, 524 U.S. 775, 786, 118 S. Ct. 2275, 2283, 141 L. Ed. 2d 662 (1998)* (quoting *Meritor Say. Bank, FSB v. Vinson, 477 U.S. 57, 67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986))*.

To prevail on a hostile work environment sexual harassment claim, a plaintiff must demonstrate that his or her work environment was both subjectively and objectively hostile. *Harris v. Forklift Sys. Inc., 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993)*. An objectively hostile work environment is one that a reasonable person would find hostile and abusive. *Id. at 21*. In determining whether a plaintiff has met this standard, a court may consider a variety of factors including "the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id. at 23*. These standards "are sufficiently demanding to ensure that Title VII does not become a 'general civility code.'" *Faragher, 118 S. Ct. at 2283-84* (citing *Oncale, 118 S. Ct. at 1002)*. The critical inquiry is whether the offensive acts alter the conditions of employment. *Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1456 (7th Cir. 1994)*.

In determining the pervasiveness of a hostile work environment, the Seventh Circuit has emphasized the frequency of misconduct. While there is no "magic number" of incidents that gives rise to a cause of action, *Doe v. R.R. Donnelley & Sons Co., 42 F.3d 439, 445 (7th Cir. 1994)*, a consistent pattern of complaints, *Dey, 28 F.3d at 1456*, or the repetition of offensive acts, *Brooms v. Regal Tube Co., 881 F.2d 412, 420 (7th Cir. 1989)*, is strong evidence of a hostile work environment, particularly when the misconduct continues despite the victim's objections. *Saxton v. A.T. & T. Co., 10 F.3d 526, 534 (7th Cir. 1993)*. "A couple incidents of misconduct by a supervisor involving inappropriate remarks

and impermissible touching of a female employee, however, does not create a hostile work environment." *Schrean v. Chicago Transit Auth., 1999 U.S. Dist. LEXIS 16614, 1999 WL 977068,* at *3 (N.D. Ill. Oct. 22, 1999). See also *Saxton, 10 F.3d at 533-34; Weiss v. Coca-Cola Bottling Co., 990 F.2d 333, 337 (7th Cir. 1993).*

In this case, Mosher sets forth only one incident of harassing conduct occurring in the workplace. Specifically, Mosher testified that on one occasion in the back of the store at Dollar Bills, Limo pulled Mosher on his lap and put his hands on her breasts. While such an behavior, assuming that it occurred, was certainly improper for the workplace, such an incident, occurring only a single time, falls far short of being sufficiently "severe or pervasive" to create a hostile work environment or to unreasonably interfere with Mosher's work performance. See, e.g., *Faragher, 118 S. Ct. at 2283,* cert. denied, *120 S. Ct. 450 (1999); Adusumilli v. City of Chicago, 164 F.3d 353, 361-62 (7th Cir. 1998); Cowan v. Prudential Ins. Co., 141 F.3d 751, 757-59 (7th Cir. 1998).* Accordingly, the Court finds that Mosher has not sufficiently established the existence of a hostile work environment to survive summary judgment.

B. Quid Pro Quo Claim

Quid pro quo harassment occurs when submission to unwelcome sexual demands is made a condition of tangible employment benefits. *Bryson v. Chicago State Univ., 96 F.3d 912, 915 (7th Cir. 1996).* "When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII." *Burlington, 118 S. Ct. at 2265.* A "tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a

decision causing a significant change in benefits." Id. at 2258.

Here, the Court finds that the record does not support a quid pro quo theory of sexual harassment. Most significantly, there is no evidence that Limo placed any sex-related conditions or limitations on her continued employed or that any aspect of her job was ever linked to her relationship with Limo. At best, Mosher's quid pro quo claim consists of her allegations that: (1) she felt pressure to go dinner with Limo the first time he asked her out; (2) shortly after she started working there, Limo asked her, just "out of the blue," if she liked her job; and (3) on one occasion, Limo told her that she could "go places" if she "played [her] cards right." Yet, despite what Mosher alleges to be her subjective concerns and fears about Limo, there is no evidence that Limo ever asked her to submit to sexual demands in order to keep her job at Dollar Tree or that he placed any conditions on her employment based on her engaging in a sexual relationship with him. Moreover, although Mosher argues that she was forced to resign from Dollar Tree because of Limo's sexual demands and her fear of losing her job, given that Mosher continued to allow Limo to stay at her apartment for five more months after she resigned at Dollar Tree, her allegations that she was forced to quit are less than credible.

In short, Mosher's quid pro quo sexual harassment claim is unsupported by the record and, therefore, cannot survive summary judgment.

III. Intentional Infliction of Emotional Distress Claim

Mosher also asserts a claim for intentional infliction of emotional distress in Count III of her Complaint. Having granted summary judgment regarding Mosher's Title VII sexual harassment claims, there is no federal claim pending before this Court. Thus, this Court, in its discretion, declines to accept supplemental jurisdiction over Mosher's state law

claim of intentional infliction of emotional distress. See, e.g., *Vukadinovich v. Board of Sch. Trustees, 978 F.2d 403, 415 (7th Cir. 1992)* ("It is well established that if federal claims are dismissed before trial, the federal district courts should generally dismiss the state law claims as well."); *Vakharia v. Swedish Covenant Hosp., 987 F. Supp. 633, 643 (N.D. Ill. 1997)* ("Ordinarily, if a court rules against a plaintiff on all federal claims short of trial the pendent state law claims are dismissed without prejudice."), aff'd, *190 F.3d 799 (7th Cir. 1999).* The Court dismisses this claim without prejudice.

CONCLUSION

For the reasons stated above, Dollar Tree's motion for summary judgment is granted. Mosher's Title VII claims (Counts I and II) are dismissed with prejudice. Mosher's state law intentional infliction of emotional distress claim (Count III) is dismissed without prejudice.

ENTER:

GEORGE M. MAROVICH

UNITED STATES DISTRICT JUDGE

DATED: 1/27/00

FOOTNOTES

[1] In addition, Mosher asserts that after leaving the restaurant, Limo kissed Mosher in the parking lot and Mosher said "don't." (Mosher Dep. at 31.) Limo denies that he attempted to kiss Mosher at all that first night.

[2] There is some dispute over the manner in which Limo requested these directions. Mosher claims that Limo "demanded" the directions, noting that he said: "Give me directions to your house." (Mosher Dep. at 40.) There is no question though that Mosher ultimately provided Limo with the directions.

No. 00-1508

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GLORIA J. MOSHER,
Plaintiff-Appellant,

v.

DOLLAR TREE STORES, INC., a Virginia corporation, and
NICK LIMO, a/k/a Michael Paul Herman,
Defendants-Appellees.

April 24, 2001

ORDER

On March 15, 2001, the plaintiff-appellant filed a petition for rehearing and petition for rehearing en banc. On April 3, 2001, the defendants-appellees filed an answer to the petition. All the judges on the original panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petitions for rehearing and for rehearing en banc are therefore DENIED.